UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE EXPLORATION MERCANTILE COMPANY, (a Corporation),

Plaintiff in Error,

vs.

PACIFIC HARDWARE AND STEEL COMPANY, (a Corporation), GIANT POWDER COMPANY, CONSOLIDATED, (a Corporation), and J. A. FOLGER AND COMPANY, (a Corporation), Petitioning Creditors,

Defendants in Error.

No. 1745

PETITION FOR RE-HEARING

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT:

With the greatest respect, we present this petition and beg the Court to reconsider its decision, upon the ground.

FIRST:

That the Court in its decision clearly overlooks and disregards,

Sec. 1 of Art. IV of the National Constitution, which reads,

"Full faith and credit **shall** be given in each state to the public acts, records and **judicial proceedings** of every other State."

But here in this case, we have **fully set out** by the Creditors

petition, the **judicial proceeding** of the State Court, and then an attempt to set that proceeding aside, and **deny full faith** and **credit** to the decision of the State Court, and this Court upholds such action.

This violates this provision of the National Constitution, for as is held in

Hanley vs. Donahue, 116 U. S. I.

"Judgments recovered in one State of the Union, when proved in the Courts of another, differ from judgments recovered in a foreign country in no other respect than that of **not** being **re-examined** upon the merits, nor **impeachable** for **fraud** in obtaining them, if rendered by a Court **having jurisdiction,** of the cause and of the parties."

There is no question, nor can there be any, but that the State Court, **had jurisdiction** of the **subject matter** and the parties. Then its judgment cannot be **re-examined** on the **merits** or **impeached** for **fraud.**

In McElmoyle vs. Cohen, 13 Pet. 312.

The Supreme Court of the United States says, under this Constitutional provision, "the judgment is a record **conclusive** upon the **merits,** to which full faith and credit **shall** be given."

In Simmons vs. Saul, 138 U. S. 439.

"That a Court of Equity will not annul and set aside, on the ground of **fraud,** a decree of the Court of another State."

Why? Because, the **fraud** is in the **exclusive** jurisdiction of the Court, rendering the decree. There it may be attacked by a **direct proceeding,** but we can not find a case, wherein a **collateral** proceeding, a **decree** can be attacked for **fraud.** Certainly the proceedings in Bankruptcy were **collateral,** and the judgment of the State Court was **binding** and **conclusive** upon the Bankrupt Court, and cannot be **impeached** upon the **merits,** nor for **fraud.**

So in the case of Kieley vs. McGlynn, 21 Wall. 503.

The Probate Court, having jurisdiction, it was held, that the will, although **alleged** to be **forged,** and probated upon **fraud,** etc., could not be attacked in a Court of Equity, because, the probate Court, could grant the relief—and that Court could only be appealed to, for as is said in,

Simmons vs. Saul, **supra,** speaking of fraud,

"These questions can be looked into and adjudicated only upon a **direct** action before the **same** Court."

And Judge Story says,

2 Story Const. (3rd, Ed.) Sec. 1313.

"If a judgment is conclusive in the State where it was pronounced, it is equally conclusive everywhere in the Courts of the United States."

In Conkey vs. Russell, 111 Fed. 417,

Where it is said, "Where the requisite diversity of citizenship to a Federal Court jurisdiction appears on the face of the bill, the jurisdiction cannot be attacked, by **evidence dehors** the record in a **collateral** proceeding by one who was not a **party** to the bill."

So in Hampton vs. McConnell, 3 Wheat, 230.

The Court says, "A judgment of a State Court has the same credit, validity and effect, in every Court within the United States, which it had in the State where it was rendered."

So in Mut. L. Ins. Co. vs. Harris, 7 Otto 331.

The Court says, "When a judgment or decree has been given in one State by a court having jurisdiction of the parties and the subject, it has the same force and effect **when pleaded** or offered in evidence in the Courts of any other State as in the State where it was rendered."

Notice the Court says, "**when pleaded**" and here the petitioners plead the proceedings of the State Court, and in Nevada, the proceedings of the State Court are binding and conclusive, and as we have shown by the authorities above cited, that the **merits** of the proceedings in the State Court cannot be **re-examined**, nor **impeached** for **fraud**, it follows, that the proceedings of the State Court, are, as said in 13 Pet. 313 **supra** that that "record is **conclusive** upon the **merits**, to which full faith and credit **shall** be given." Notice that the Constitution uses the word, "**shall**" not maybe, or can be, or might, but "**shall** be given full faith and credit." This is **mandatory**, not permissive. The very moment then, that the petitioners, set up the proceedings in the State Court, that record became **conclusive** upon the merits, and could not be **re-examined** to contradict the **facts** in that record, and could not be **impeached** for **fraud**. Such being the case, no **averment** in the complaint, that the **facts** were not as set out in that record, or that the proceedings were **fraudulent** could overthrow that record, nor would evidence to the contrary be admissable to impeach it. It then stood as an **unimpeachable** truth, that the corporation was not Insolvent, that it did **not apply** for the appointment of a receiver. In the State Court, this would be the **force** and **effect** of those proceedings, and as Judge Marshall says, in 3.

Wheat. 230 **supra** it "would have the same credit, validity and effect, in every Court within the United States, which it had in the State where it was rendered."

But this Court in its decision, does not give it that credit, validity and effect, but violates this constitutional rule, and holds that a party may in his pleading over a different state of facts, contradict the cause on its **merits** in the State Court, and by alleging a **fraud** overthrow the action of the State Court, even though, there can be **no question,** that under the Statute of Nevada, relating to corporations, the State Court had complete, perfect and absolute jurisdiction.

Now the Courts have uniformally held, that the proceedings of the State Court must be taken as it appears upon the face of the record, as is said in,

In re Edward Ellsworth Co. Advance Sheet of Fed. Reporter, Dec. 30th, 1909, p. 699,

where it is said,

"Inasmuch as the record in the Circuit Court action does not assert or claim that the Edward Ellsworth Company was insolvent, within the mearing of the Bankrupt act, this Court is **precluded from considering evidence** aliunds to contradict the decree or judgment appointing receivers and setting forth the basis of such appointment. This appears to be settled by abundant authority,

Blue Mt. Iron & Steel Co., vs. Portner, 131 Fed. 57.
In re Douglass, 131 Fed. 769.
In re Spaulding, 139 Fed. 245.
Moss vs. Arend, 146 Fed. 351.
Collier on Bank, 7th Ed. 82.
Thomkins Co. vs. Catawba Mills, 82 Fed. 780.

Now these authorities are not to be taken as simply applying to bankruptcy proceedings, "because of insolvency," as seems to us to be the ruling of this Honorable Court, but because, the **rule** as to the proceedings in the State Court, is not limited to **one class** of cases, but applies **everywhere** and **at all times,** when the proceedings of the State Court are attacked in **another Court,** and the proceeding in the State Court, becomes **conclusive** on the **merits** and **unimpeachable** for **fraud,** so that a proceeding in Bankruptcy "being insolvent" is as much bound by the action of the State Court, as "because of insolvency." Because, the record of the State Court, under the National Constitution "**shall be given full faith and credit.**' This seems too plain to need amplification. Therefore all the

averments in the Creditors Petition, attacking the proceedings in the State Court, are mere surplusage, because the records of the State Court, cannot thus be attacked, and no evidence would be admissable under such an averment—thus leaving the Creditors' petition destitute of any facts. If this is not the law, then any suit in a State Court, can set aside a judgment in the Federal Court, by simply alleging that the Creditors conspired, confederated and agreed, fraudulently and corruptly to file a petition in bankruptcy against the corporation, with the intent and purpose to ruin and destroy the corporation which was then and there through the receiver of the State Court clearing over and above $3,000 per month for the Creditors of the corporation, and falsely, corruptly and maliciously alleged that the corporation had applied for a receiver, when in truth and fact it never did, for the reason that director and stockholder Hobbs was not in the State of Nevada, and Wiley knew nothing of the proceeding in the State Court until he was served with process and that Stone acted alone, without any consultation or knowledge of any one but his attorney, etc., and that said creditors falsely and corruptly, charged that said corporation was insolvent, when in truth and fact it was not insolvent, which said petitioners than and there knew, and by so alleging **retry** the facts tried in the Federal Court, and render its decision of no effect. To avoid just such a condition of affairs, this Constitutional provision steps in and prohibits such a proceeding, compelling each Court to give **full faith** and **credit** to the proceedings of the other Court. Any other judicial decision would be out of harmony with the National Constitution and the decisions of the Supreme Court of the United States, and the Federal Courts.

SECOND:

The decision of this Court is not in harmony with Judicial decision elsewhere, for as is said in,

In re Ellsworth Co. Advance Sheets of Fed. Rep. Dec. 30th, 1909, p. 699, it is said,

"Where a suit in equity was brought by creditors to wind up a corporation and for the appointment of a receiver, the bill alleging that it was **unable** to meet its obligations as they matured and that it would be to the advantage of creditors and stockholders that its affairs be wound up, but that it was solvent, the filing of an answer by the corporation, **admitting** such allegations and **joining** in the **request** for a **receiver**, did

not constitute an "act of bankruptcy" under Bank. Act July 1, 1898, C. 541, Sec. 3a. (4) Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended in 1903 (Act. Feb. 5th, 1903, C. 487. Sec. 2, 32 Stat. 797) (U. S. Comp. Supp. 1907 p. 1025), which makes it an act of bankruptcy if a debtor "being insolvent" applied for a receiver or trustee for his property" nor was the appointment of a receiver in such suit made," so as to constitute an act of bankruptcy under such section."

Here the Court deals with both provisions of the Bankrupt Act, "being insolvent applied for a receiver" and "because of insolvency a receiver was appointed" and does not hesitate to say,

"A Court of bankruptcy **cannot consider evidence** aliunde to contradict the **recitals** of an order of a court of equity appointing receivers for a corporation, and to show, **contrary to such recitals,** that such appointment was made **because of the corporations** insolvency, and constituted an act of bankruptcy."

This case is square to the point, because there is nothing in the proceedings of the State Court, showing insolvency or that a receiver was applied for or made because of insolvency, and if the Court cannot **consider** evidence aliunde to contradict the recitals of that record, then there is no act of bankruptcy, and the decision of this Court is in square conflict with this decision.

But the Court says further. "The bankrupt Act has not superceded the right and power of a Court of Equity to take charge of the property of an insolvent corporation for the protection of stockholders and creditors, Marshall the same, recognize and enforce valid liens and priorites and equally distribute the surplus proceeds among its Creditors."

Also in In Re Southern Steel Co., 169 Fed. 702.

The facts are much stronger than in this case, because a resolution had been adopted by the Board of Directors, authorizing an attorney to consent to bankruptcy, and yet it was not an act of bankruptcy.

So in Perry Aldrich Company. 165 Fed 249

It is said, "The appointment of, receivers to take charge of property of a corporation **at suit of a stockholder** (this case) who alleged fraud and mismanagement by the officers and that the corporation was in **danger of insolvency,** but not that it was insolvent, cannot be said to have been "because of insolvency" so as to constitute an act of bankruptcy."

And in that case, the Court said, "Whether the corporation was **actually insolvent** or not when the bill was filed or the receivers appointed seems to me wholly **immaterial**, unless it can also be made to **appear** that the Court **so found**, either upon the evidence before it or the agreements of the parties and **made the fact at least one of the grounds of its action.**"

Here again, the Court will not go behind the Court record. Because **insolvency**, to become **an act** of bankruptcy under **any circumstances**, must **be a ground** upon which the Court acts. If the Court does not **act upon insolvency**, then the proceeding in the State Court, is **not** an act of bankruptcy, whether the corporation was **solvent** or **insolvent**, whether it applied for a receiver or did not apply for a receiver. The fact is, as shown by the Creditors' petition, that no **application** of any kind was made to the State Court, by reason of the **insolvency** of the corporation. It was therefore not applied for on any theory of insolvency, and certainly "being insolvent" necessarily means, that the appointment of the receiver was because of insolvency, for the appointment of a receiver is not an act of bankruptcy under any law. The bankrupt act, cannot mean anything but, that a reciver was applied for, by reason of, and on the ground of insolvency. If no application was made with insolvency as the ground of the proceeding, then the application was not an act of bankruptcy, and as we showed in our former briefs the bankrupt act is **strictly** construed.

The decision of this Court, therefore, is not in harmony with the rule laid down by other Courts.

THIRD:

This writ, it is true, is not before the Court upon the evidence in the cause, but attacks the complaint alone. And therefore this Court passes upon the case, the same as if a demurrer was being argued. It cannot **suppose** evidence or take excerpts from the opinion of the lower Court. The sufficiency of a complaint cannot be passed upon, by subsequent proceedings in a cause. The opinion of the Court, **as to facts,** is no part of the record, and particularly when the record of the State Court, cannot be contradicted, by evidence **aliunde** of the record.

And this very Court in

Mut. R. E. Life Assu. vs. DuBois 85 Fed. 586,

Held, "that the opinion of the Court, was no part of the record," and that an assignment of error could not be pre-

dicated upon it. If the opinion of the Court is no part of the record, then any fact set out in said opinion, cannot be used to determine or affect the question before this Court, for such facts in said opinion is not a finding of fact, and even if it were, those facts could not be used upon the question of whether the Creditors' petition states facts sufficient. Strike from the Creditors' petition all averments contradicting the State Court record and the conclusions of law is said petition, as we have herein shown must be done, and you have nothing left, but the proceedings in the State Court, and we have shown in our brief on file herein, that the State law of Nevada, will not permit a corporation to file a complaint for the appointment of a receiver, and as our brief on file herein, shows by numerous and undisputed authority, that a corporation cannot apply for the appointment of a receiver, unless a law authorizing it, we have the strange situation, that the Creditors claim a thing to be done, which cannot be done and which was not done, and yet this Honorable Court upholds this remarkable situation, upon the theory that a Court of Equity will declare that to be done, which was not done, and which could not be done by a corporation, and that too in a **collateral attack**—not in a **direct** proceeding.... We can find **no authority** to sustain this position, after careful investigation, either in Courts of law or equity. The corporate entity has never been used for any purpose. A single stockholder authorized by law and no one else commenced proceedings in the State Court. It was not a corporate act. It could not under any circumstances be a corporate act. It was beyond the power of the corporation, and being beyond the power of the corporation, it could not be **ratified** and become a corporate act, and no Court of Equity can **twist** it into a corporate act."

Besides the Statute of Nevada cannot be used to **defraud** creditors. It is an equitable statute, because one of the cardinal rules of Equity is "Equality is Equity." It simply prevents one creditor by attachment, from obtaining a **preference**. All are put on an equality. It prevents the waste of the estate, and thwarts the mismanagement of the corporate affairs. No creditor is injured. The assertion in the petition that it was to evade the bankrupt law, is a **false** statement, for the reason, it prohibits the corporation from filing a voluntary petition in bankruptcy.

SEC. 4, BANKRUPT ACT.

If a corporation cannot file a petition in bankruptcy, how

could it **evade** the bankrupt Act? Evade, means to get away, avoid, elude. Could it anticipate a petition in bankruptcy? Certainly not. Why? Because a corporation, **can only** be put in bankruptcy **when it** commits **an act** of bankruptcy.

SEC. 3 BANKRUPT ACT.

It matters not how **insolvent** it may be, it can not of its own accord file a petition in bankruptcy, nor can it be put in bankruptcy, because it is insolvent. It therefore cannot evade the law. It cannot take any action with **intent** to violate the bankrupt act. Such averments in the petition, and such reasoning in this Honorable Court's opinion, are entirely unwarranted, because it **must commit** an Act of bankruptcy before proceedings can be taken against it.

Therefore the allegation in the petition, "And would evade the provisions of the laws of the United States in reference to bankruptcy, and prevent said creditors from obtaining a knowledge of the true condition of said corporations affairs or from having or participating in the choice of a person or persons to act as trustee of said corporation or its property" is simply false, both in law and in fact, for had no complaint been filed in the State Court, no proceedings could have been taken against it, in the bankrupt Court, because there would not have been an act of bankruptcy and therefore the proceedings in the State Court, cannot be for any such purpose, for not being an act of bankruptcy, it does not evade the bankrupt law, and if an act of bankruptcy, then no creditor has a right to complain.

But suppose, it **was** done, which we deny, "for the purpose of hindering, delaying and defrauding Creditors," that is not an **act** of bankruptcy, under the bankrupt law. The bankrupt law, only makes the hindering, delaying and defrauding Creditors, an element of bankruptcy, when the **Act** of bankruptcy is charged under sub. 1-A Sec. 3. Bankrupt Act. Here the charge is not under that sub-division, and the **intent** with which the proceeding was taken does not create an act of bankruptcy.

In Re Varock Bank 119 Fed. 991.

In Re Wilmington H. Co. 120 Fed. 180.

View this petition from any point and it utterly fails to state an act of bankruptcy, under the Bankrupt Act.

FOURTH:

In conclusion we beg to call the Court's attention, to the serious results of this decision. Here was a going corporation

in the hands of the State Court, where every creditor under the State law was fully protected. A receiver under a heavy bond, conducting the business successfully to the advantage of creditors. Every creditor had his day in Court. If the receiver was not satisfactory they could move to have one of their own. But in steps a few creditors, enjoins the State Court receiver, closes down the business, ruins the corporation, reduces the value of its assets, destroys the value of its stock, puts it to expense of preserving the property without income, while waiting all these long months for a correct interpretation of the law. If the estate is dissipated, who has dissipated it? What becomes of the State law? Is it repealed? It is not an insolvent law, but a law relating to corporations. Nevada has a separate Insolvent law. The corporation cannot apply in bankruptcy. It does not wish to avoid its debts, but wants to pay them. It cannot be put in bankruptcy because in debt. The only relief is the State law. A stockholder asks that relief. The law provides it. It commits no act of bankruptcy, so far as the proceedings in the State Court is concerned. It cannot apply as a corporation in the State Court. The law will not permit it. But now we are told that the act of a single stockholder, is the act of the corporation. We know the corporation cannot act, and therefore cannot confer the power on any one else to act for it. And what it cannot do, **they say it did do.** We earnestly insist, that there is no law, no judicial decision, no cases in equity, which can uphold this decision. The importance of this question, in view of the fact, that it is not in harmony with the National Constitution, nor with the decisions of other Courts, that it virtually sets aside the State law, that it gives an interpretation to the Bankrupt Act not given by any other Court, and from the further fact, that no corporation in Nevada, is safe from the spoliation of its property, and the utter ruin of the value of its corporate stock, and the destruction of its business, if it happens to be in debt, and a stockholder exercises his right under the Nevada law, if such **act,** is an **act of bankruptcy.** By bankruptcy, the corporation is at once ruined, its business suspended, its officers enjoined, and its assets dissipated. Under the State law it is protected. No creditor loses. Its business continues. Its mismanagement corrected. Bankruptcy destroys, while the State law preserves. We therefore, with great respect, ask this Court, to re-consider its decision, and give the plaintiff in error a re-hearing of this cause, and if doubts exists in the

minds of this Honorable Court, as to the true meaning and construction, of that part of the bankrupt law, realting to "being insolvent, applied for the appointment of a receiver, etc," that it certify the question to the Supreme Court of the United States, that we may have a settled interpretation, for the future guidance of all Courts and litigants.

We respectfully ask this Honorable Court to grant this our petition.

Thompson Moorhouse & Thompson

Attorneys for Plaintiffs in Error.

I hereby certify, that in my judgment, that the foregoing petition for re-hearing is well founded, and that it is not interposed for delay.

H. V. Moorhouse

Of Counsel for Plaintiff in Error.